VICTORIA UNIVERSITY OF WELLINGTON TE HERENGA WAKA

Centre for Labour, Employment and Work

What lies ahead for regulatory change in 2020

Dr Stephen Blumenfeld, Director, CLEW

Despite the many amendments to New Zealand's employment laws and nuances in administrative practice over the past 30 months, the Government is looking to make yet more changes in the leadup to the 19 September general election. We look here at some of the most recent changes to employment law, the impact of those changes and what 2020 is likely to entail.

Enforcement of employment standards

The Labour Inspectorate has a continuing focus on enforcing employment law and prosecuting breaches. The onus of compliance with employment obligations generally rests exclusively on provisions added to New Zealand's employment laws by the previous Government giving labour inspectors the ability to go to the Employment Court for a declaration of breach and attribute liability to a person other than the employer who breaches minimum entitlement provisions. Under the *Employment Relations Amendment Act 2016*, the Labour Inspectorate may also seek an order for the recovery of any penalty arising from the breach and apply for an order banning the person from being an employer, company director, or other officer of an employer involved in the hiring of employees.

Following the 2017 General Election, the incoming Government vowed to increase resourcing for labour inspectors and to confer additional powers on labour inspectors to promote the effective enforcement of employment standards and hold personally to account those responsible for employment standards breaches. To that end, the Government provided $8.8 million in its 2018 budget to cover the cost over four years of hiring more labour inspectors and support staff of the Labour Inspectorate. As at the end of June last year, there were 71 labour inspectors, up from 60 at the time of the election. This, according to Workplace Relations and Safety Minister Iain Lees-Galloway, exceeds the International Labour Organisation's benchmark of one inspector per 10,000 workers for enforcement of both employment standards and health and safety requirements.

Labour inspectors are increasingly using these new powers, often assessing penalties far in excess of what the business may have gained as a result of repeated employment law violations. Last year, the Labour Inspectorate took 21 cases to the Employment Relations Authority or the Employment Court, resulting in total awards of $491,576 in wage and holiday pay arrears and $948,627 in penalties to be paid by individuals found personally liable for employment law breaches. This marks a significant increase on previous years, and there is every reason to expect this trend to continue in 2020. In addition, the Court has demonstrated its willingness to put employers who exploit their workers by flouting the law out of

business. This places those who exercise significant influence over the management or administration of an organisation on notice that they can be held personally responsible and heavily penalised if they fail to ensure employees of their basic rights under the law.

MBIE has also set up a debt collection unit targeting employers and individuals who have ignored orders to compensate workers. Debt recovery orders from the Employment Relations Authority or the Employment Court are imposed on employers, directors, senior managers, legal and business advisors and others who have breached employment laws or have subject their workers to exploitation. Although there remains some uncertainty around how wide this form of vicarious liability might extend, by granting the Labour Inspectorate the ability to act in respect of the recovery of the debt incurred by breaches of employment standards, the risk of employers liquidating their business to avoid liability is greatly mitigated.

Preventing exploitation of migrant workers

The Government has also committed to making policy changes to address migrant worker exploitation in New Zealand. While exploitative working conditions, including wage theft, excessive hours of work and denial of breaks, are not restricted to any part of the labour market and affects New Zealand-born workers as well, exploitation of workers is rife in some industries and occupations. Most noteworthy are those in which the migrant workforce is heavily concentrated, such as hospitality, construction, dairy farming and horticulture, all industries which employ a large share of seasonal workers. Moreover, although they have the same minimum employment rights as all other employees under New Zealand law, because Immigration New Zealand makes these workers bound to their employers, migrant workers are often more susceptible to exploitation than others in the labour market.

Despite the previously discussed amendments enacted in 2016 that enable persons other than the employer to be held responsible for breaches of minimum employment standards, the regulation has proven insufficient in protecting migrant workers. In recognition of the greater vulnerability of these workers to exploitation, the Government mooted a proposal in October which aims to prevent conditions that might subject migrant workers to exploitation, enable them to leave exploitative employment and deter employer non-compliance through a fit-for-purpose offence and penalty regime. Any legislation to come out of this process would make an individual with significant control or influence over an employer legally responsible when that employer breaches employment standards. Importantly, if enacted as currently proposed, that law change would bar those convicted of exploitation under the *Immigration Act 2009* from directing or managing a company.

Protections for 'dependent contractors'

When it came to Government in 2017, the Labour-led coalition had promised to introduce statutory support and legal rights, and extend the right to organise and bargain collectively, to contractors who primarily sell their labour. With this objective in mind, the Government is currently looking at ways of enhancing legal protections for workers who are misclassified as 'contractors' by some employers in order to save money when they are actually employees. Other workers to whom the Government hopes to extend legal protections are in the 'grey zone' between employee and contractor status. This status pertains to workers under the control of an employer but who do not receive the legal protections provided to employees, making them 'dependent contractors' rather than either 'employees' or 'independent contractors'. This would include workers operating in the gig economy and who find work through

online platforms, such as Uber, Task Rabbit or Mechanical Turk, that connect workers acting as free agents with customers who require a service.

The Survey of Working Life 2018 indicates there are over 140,000 self-employed contractors in New Zealand, accounting for more than 5 percent of the total employed population. With the rapidly changing nature of work and expansion of the gig economy, contracting arrangements are likely to become more common. Employees misclassified as contractors and workers who are truly dependent contractors are in a vulnerable position and lack basic employment protections, such as entitlement to the statutory minimum wage and paid leave, the right to take a personal grievance against their employer, as well as the power to negotiate better terms and conditions.

At present, businesses which have misclassified workers may be held liable for unpaid employment entitlements, but there is no separate penalty for the misclassification itself. The Government is considering legislation which would widen the definition of 'employee' and conceivably extend the right to collective bargaining to some contractors. It has also proposed increasing proactive targeting of employers and sectors with bad employment standards records by Labour Inspectorates and increasing penalties for employers found to be in breach of those laws.

The Government is currently seeking feedback on possible options for change, which aim to:

- deter employers from misclassifying workers as contractors and not employees,
- make it easier for workers to access a determination of their employment status,
- change who is an employee under New Zealand law, and
- enhance protections for contractors without making them employees.

Other legislative changes coming this year (or not)

Other changes coming in 2020 include increases in the legislated minimum wage to $18.90 an hour and the duration of paid parental leave to 26 weeks, due on 1 April and on or after 1 July 2020, respectively. In addition, the *Employment Relations (Triangular Employment) Amendment Act 2019*, which aims to provide more robust protection to employees employed by a hire or recruitment company but working under the control or direction of a third party, is scheduled to come into force no later than 27 June. Thereafter, an employee and/or employer may apply to the Employment Relations Authority or the Employment Court to join the 'controlling third party' to proceedings to resolve a personal grievance which relates to an action that is alleged to have occurred while the employee was working under the direction of a controlling third party.

Two long-anticipated legislative changes, amendments to the rules around pay for workers while on leave and a law supporting negotiation of fair pay agreements, have made no progress. Regarding the former, the *Holidays Act 2003* has been thoroughly tested since first enacted, with significant non-compliance issues across a wide range of New Zealand businesses, followed by many costly and time-consuming remedial processes. The Holidays Act Taskforce was formed in May 2018 to consider how the current legislation might be improved and issues leading to widespread non-compliance might be resolved. The Taskforce reported back to the Minister for Workplace Relations and Safety in October. Those recommendations are apparently still under consideration, with no draft legislation on the horizon.

As to the latter, as envisaged by the working group establish by the Minister for Workplace Relations and Safety in 2018 to study the viability of such a system, fair pay agreements would set occupation- or

industry-specific minimum employment standards, such as wages, redundancy and/or overtime. These would be agreed through bargaining between affected workers and employers, or their respective representatives, and then become legal requirements in that sector. The Government released a discussion paper in October which sought feedback on a range of options for the design of a fair pay agreements system. Consultation on that document closed on 27 November, but there has been no indication from the Government of the direction any subsequent legislation will take.

Finally, progress on the Government's pay equity legislation appears also to have stalled. The Equal Pay Amendment Bill was jointly introduced to Parliament by the Minister for Workplace Relations and Safety and Acting Minister for Women on 19 September 2018, the 125th anniversary of women's suffrage in New Zealand. The bill seeks to improve the process for raising and progressing pay equity claims and to eliminate and prevent gender-based discrimination in pay and conditions for work done within female-dominated jobs. It implements recommendations of the reconvened Joint Working Group on Pay Equity Principles, including a tiered disputes resolution process that makes court action a last resort, hence lowering the bar for workers initiating a pay equity claim. The Bill was reported on by the Education and Workforce Committee in May of last year but is still awaiting its second reading in Parliament.